

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FERMIN MENDOZA;
FRENCHMAN HILL
APARTMENTS RESIDENT
ASSOCIATION.

Plaintiffs,

V.

FRENCHMAN HILL
APARTMENTS LIMITED
PARTNERSHIP; CAMBRIDGE
MANAGEMENT, INC.; HOUSING
AUTHORITY OF GRANT
COUNTY; JOHN POLING, in his
official capacity as Executive
Director of the Housing Authority of
Grant County; WASHINGTON
STATE HOUSING FINANCE
COMMISSION; KIM HERMAN in
his official capacity as Executive
Director of the Washington State
Housing Finance Commission,

Defendants.

NO. CV-03-494-RHW

**ORDER DENYING IN PART
AND GRANTING IN PART
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Before the Court is Plaintiffs' Motion for Summary Judgment (Ct. Rec. 31). A hearing on the above motion was held on January 6, 2005, in Spokane, Washington. The Plaintiffs were represented by Judith Lurie and Stephen Frederickson. Defendants Washington State Housing Finance Commission and Kim Herman (the "Commission") were represented by John Nelson. Defendants Frenchman Hill Apartments Limited Partnership, Cambridge Management, Inc., Housing Authority of Grant County, and John Poling were represented by Thomas

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1 Ahearne.

2 The Plaintiffs seek partial summary judgment that: (1) the Washington State
 3 Housing Finance Commission and the Frenchman Hill Apartments Limited
 4 Partnership (“FHA Partnership”) violated 26 U.S.C. § 42(h)(6) by failing to have
 5 in place an agreement expressly prohibiting the eviction of low-income residents
 6 without good cause; and (2) that the FHA Partnership and the management of the
 7 Frenchman Hill Apartments violated the due process clause by attempting to
 8 terminate the Mendoza family’s tenancy without good cause. The Plaintiffs allege
 9 that both claims are enforceable through 42 U.S.C. § 1983 and seek declaratory
 10 and injunctive relief.

11 For the reasons stated herein, the Court *sua sponte* grants summary
 12 judgment in the Defendants’ favor on the claim for relief under 26 U.S.C.
 13 §42(h)(6), and grants Plaintiff’s motion for summary judgment, on narrow
 14 grounds, on the due process claim.

15 **Standard of Review**

16 Summary judgment is appropriate if the “pleadings, depositions, answers to
 17 interrogatories, and admissions on file, together with the affidavits, if any, show
 18 that there is no genuine issue as to any material fact and that the moving party is
 19 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). When considering
 20 a motion for summary judgment, a court may neither weigh the evidence nor assess
 21 credibility; instead, “the evidence of the non-movant is to be believed, and all
 22 justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

24 “Even when there has been no cross-motion for summary judgment, a
 25 district court may enter summary judgment *sua sponte* against a moving party if
 26 the losing party has had a ‘full and fair opportunity to ventilate the issues involved
 27 in the matter.’” *Gospel Missions of America v. City of Los Angeles*, 328 F.3d 548,
 28 //

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1 553 (9th Cir. 2003) (citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir.
 2 1982)).

3 **Facts**

4 Defendant Fermin Mendoza and his family are residents of the Frenchman
 5 Hill Apartments (the “Apartments”), located in Royal City, Washington. On
 6 August 27, 2000, Mr. Mendoza entered into a six-month lease that automatically
 7 converted to a month-to-month tenancy. The lease agreement designates his
 8 apartment as a low-income housing unit. On or about November 25, 2003, Mr.
 9 Mendoza was served with a 20-day eviction notice, terminating his tenancy
 10 effective December 31, 2003. The notice did not provide any reasons for the
 11 termination of his tenancy.¹

12 The Apartments are owned by the Defendant Frenchman Hill Apartments
 13 Limited Partnership (“FHA Partnership”). The FHA Partnership receives annual
 14 tax credits for the Apartments through the Federal Low Income Housing Tax
 15 Credit Program, 26 U.S.C. § 42. One-hundred percent of the 25 housing units at
 16 the Apartments are set aside for low-income residents.

17 The managing general partner of the FHA Partnership is the Defendant
 18 Housing Authority of Grant County (“GCHA”). GCHA owns .01 percent of the
 19 FHA Partnership, and is the general partner of the Partnership. The GCHA
 20 manages the day-to-day affairs of the FHA Partnership. The GCHA is a public
 21 housing authority and municipal corporation, established pursuant to Wash. Rev.
 22 Stat. § 35.82. The Apartments are managed by Cambridge Management, Inc.
 23 (“Cambridge”), a private corporation. The 99.99% owner of the FHA Partnership

24
 25 ¹ The Defendants have since stipulated to a preliminary injunction that
 26 prevents the eviction of Mr. Mendoza or other residents of the FHA Apartments.
 27 In addition, the Defendants have accepted rent from Mr. Mendoza, voiding the
 28 eviction notice. Therefore, the Plaintiff is not under immediate threat of eviction.

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is Related Capital Partners XI, L.P.

The Apartments are subject to a “Regulatory Agreement (Extended Use Agreement),” that was executed by the FHA Partnership and the Washington State Housing Commission. This agreement is intended to serve as the extended low-income housing commitment, required by 26 U.S.C. § 42, for the allocation of low-income housing tax credits. The agreement, however, does not explicitly prohibit the eviction of tenants from low-income units other than for good cause during the entire extended low-income housing period.

Frenchman Hill Apartments Resident Association (the “Association”) is a community group made up of tenants of the Frenchman Hill Apartments that was formed to represent the interests of current residents of the apartment complex.

Discussion

1. Mootness

The Defendants assert that the Plaintiffs claims are moot because (1) Defendant Washington State Housing Commission is in the process of complying with the IRS Revenue Ruling 2004-82, which would provide the Plaintiffs with the protections they seek; (2) the FHA Partnership has filed a document confirming that it will comply with the IRS Revenue Ruling 2004-82 as long as that ruling remains in effect; and (3) Plaintiffs have since accepted rent from Mr. Mendoza, thus nullifying the notice for the purpose of the Washington Unlawful Detainer Act. Wash. Rev. Stat. § 59.12 *et seq.*

In order for plaintiffs to have standing to seek an injunction or declaratory relief, they must demonstrate that their claims of continuing injury are not speculative. *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). If plaintiffs cannot show continuing injury, they may nonetheless comply with Article III under the capable of repetition, yet evading review exception to the doctrine of mootness. *See N.A.A.C.P. v. City of Richmond*, 743 F.2d 1346m 1353 (9th Cir. 1984).

The Court finds that the issuance of IRS Ruling 2004-82 does not render this

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1 action moot. While the IRS ruling is highly relevant to the situation at hand, it is
 2 not binding on this Court. *See Omohundro v. United States*, 300 F.3d 1065, 1068
 3 (9th Cir. 2002). Moreover, the ruling by its own terms only requires compliance
 4 within one calendar year. Because the Defendants have not yet fully complied
 5 with the ruling and the alleged violations of 26 U.S.C. § 42(h)(6) may continue in
 6 the interim, the Court finds that a live controversy still exists.

7 Furthermore, the acceptance of rent has not mooted this action. *See*
 8 *Housing Resource Group v. Price*, 958 P.2d 327 (Wash. Ct. App. 1998) (holding
 9 that if landlord accepts rent with knowledge of prior breach of lease covenant,
 10 landlord generally waives right to evict based on that breach). The Defendants
 11 only accepted rent from Mr. Mendoza after this lawsuit was filed. If the
 12 Defendant's acceptance of rent rendered this action moot, the Plaintiff's claim
 13 would fall into the category of situations of wrongs capable of repetition and
 14 evading review. "The 'capable of repetition, yet evading review' exception to
 15 mootness applies when (1) the challenged action is too short in duration to be fully
 16 litigated before cessation or expiration, and (2) there is a reasonable expectation
 17 that the same complaining party will be subjected to the same action again." *Cole*
 18 *v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000).

19 In *Gallman v. Pierce*, a district court applied the capable of repetition, yet
 20 evading review exception to the termination of public housing tenants' leases. 639
 21 F. Supp. 472, 480 (N.D. Cal. 1986). The court explained in *Gallman* that the first
 22 prong of the capable of repetition, yet evading review exception review was met
 23 because

24 month to month tenants receive either a three or a thirty day notice of
 25 termination. A period of a month, and certainly three days, is a very brief
 26 time in which to litigate unstated reasons for termination, or alleged
 27 statutory and constitutional alleged deficiencies in the notice.

28 Under the Washington Unlawful Detainer Act, a similarly short time frame is
 involved. *See* Wash. Rev. Stat. § 59.12 *et seq.* Moreover, as in *Gallman*, there can

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1 be no serious question about the likelihood that the plaintiffs will at some time
 2 receive other termination notices. Accordingly, the Court finds that the capable of
 3 repetition, yet evading review exception applies and a justiciable controversy
 4 exists.

5 **2. The Federal Low Income Housing Tax Credit Program**

6 Plaintiffs allege that the Federal Low Income Housing Tax Credit Act, 26
 7 U.S.C. § 42, confers individual rights on low income tenants that are enforceable
 8 through 42 U.S.C. § 1983. The Defendants dispute this assertion, arguing that the
 9 only remedy for violation of the tax-credit program is revocation of the tax credits
 10 by the Internal Revenue Service.

11 **A. The Duration fo the Good Cause Eviction Requirement**

12 The parties contest whether the good cause eviction requirement applies to
 13 the full duration of a housing development's low-income housing commitment, or
 14 only during the transitional periods described at 26 U.S.C. § 42(h)(6)(E). The
 15 Court looks to the plain language of the statute, any relevant legislative history and
 16 agency interpretation to interpret the statute.

17 The Federal Low Income Housing Tax Credit Program, 26 U.S.C. § 42, was
 18 enacted under Congress's taxing and spending powers, to support the development
 19 of low-income housing. In order to receive tax credits, housing developments must
 20 enter into long-term commitments to offer low-income housing to qualified
 21 persons. Under 26 U.S.C. § 42(h)(6)(A), “[n]o [tax] credit shall be allowed . . .
 22 unless an extended low-income housing commitment is in effect as of the end of
 23 such taxable year.”

24 An “extended low-income housing commitment” is defined in 26 U.S.C.
 25 § 42(h)(6)(B) as an “agreement between the taxpayer and the housing credit
 26 agency.” An “extended low-income housing commitment” is defined as an
 27 agreement between the taxpayer (here, FHA Partnership) and the housing credit
 28 agency (here, the Commission) “which prohibits the actions described in

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1 subclauses (I) and (ii) of subparagraph (E)(ii). 26 U.S.C. § 42(h)(6)(B)(i)
 2 Subparagraph (E)(ii), in turn, provides for certain prohibitions against “eviction or
 3 the termination of tenancy (other than for good cause),” 26 U.S.C. §
 4 42(h)(6)(E)(ii)(I), and must “allo[w] individuals who meet the income limitations .
 5 . . to enforce [the good cause requirement] in any State court.” 26 U.S.C. §
 6 42(h)(6)(B)(ii).

7 When interpreting a statute, courts must examine the plain language of the
 8 statute to “derive meaning from context, and this requires reading the relevant
 9 statutory provisions as a whole.” *See United States v. Hanousek*, 176 F.3d 1116,
 10 1120 (9th Cir.1999) (citations omitted). Here, the Defendants argue that, based
 11 upon the legislative history of section 42, 26 U.S.C. § 42(h)(6)(B)(i) implicitly
 12 incorporates the limitations contained in subsections (h)(6)(E)(I) and (II), and
 13 therefore the good cause limitations only apply for a three year period in certain
 14 circumstances such as foreclosure, or sale. The plain language of 26 U.S.C. §
 15 42(h)(6)(B)(i), however, only points to the “subclauses (I) and (II) of subparagraph
 16 (E)(ii)” and no more. In the following subclause 42(h)(6)(B)(ii), which provides
 17 that the good cause requirement must be enforceable in state court, no mention is
 18 made of limiting the duration of the enforceability of the good cause requirement
 19 to a three year period. Therefore, the plain language of the statute supports the
 20 Plaintiffs’ contention that the good cause requirement shall be in effect for the
 21 entirety of the low-income housing commitment.

22 The Plaintiffs, in turn, assert that this Court should determine that the good
 23 cause eviction requirement applies to the full duration of a housing development’s
 24 low-income housing commitment based on IRS Revenue Ruling 2004-82. That
 25 ruling unequivocally holds that the good cause limitations of 26 U.S.C. §
 26 42(h)(6)(E)(ii) applies during the entire extended low-income housing
 27 commitment. While the Court is not bound by this interpretation, it has great
 28 persuasive value, and suggests that the FHA Partnership is bound by the good

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1 cause requirement for the full 30 years of its commitment. *See Omohundro*, 300
 2 F.3d at 1068 (court should defer to agency decision based on thoroughness evident
 3 in consideration, reasoning and consistency).

4 Finally, other courts to interpret 26 U.S.C. §§ 42(h)(B)(i) and
 5 42(h)(E)(ii)(I) have found that the extended low-income housing commitment
 6 must include a prohibition against eviction without good cause for the duration of
 7 the extended low-income housing commitment. *See Carter v. Maryland Mgmt.*
 8 Co., 337 Md. 596 (2003); *Cimarron Village v. Washington*, 649 N.W. 2d 811
 9 (Minn. Ct. App. 2003). The Court finds the analysis and reasoning of these
 10 opinions highly persuasive.

11 For these reasons, the Court finds that the prohibition contained in
 12 42(h)(E)(ii)(I) must be in effect for the duration of the extended low-income
 13 housing commitment.

14 **B. The Existence of an Enforceable Right**

15 Plaintiffs argue that the good cause provision of 26 U.S.C. §§ 42(h)(6)
 16 creates an enforceable right under 42 U.S.C. § 1983. Section 1983 creates a
 17 federal remedy for violations of federal statutes by agents of the state. *See Maine*
 18 *v. Thiboutot*, 448 U.S. 1 (1980). Section 1983 provides, *inter alia*, that:

19 Every person who, under color of any statute, ordinance, regulation, custom,
 20 or usage . . . subjects, or causes to be subjected, any citizen of the United
 21 States or other person within the jurisdiction thereof to the deprivation of
 22 any rights, privileges, or immunities secured by the Constitution and laws,
 23 shall be liable to the party injured in an action at law, suit in equity, or other
 24 proper proceeding for redress . . .

25 42 U.S.C. § 1983. Two exceptions to this doctrine exist. First, section 1983 may
 26 be used only to remedy statutory violations where an independent statute creates an
 27 enforceable right, privilege, or immunity. *See Pennhurst State School and*
Hospital v. Halderman, 451 U.S. 1 (1981). Second, section 1983 is not available
 28 where Congress has demonstrated an intent to foreclose the use of section 1983
 through a comprehensive remedial scheme. *See Middlesex County Sewerage*

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1 *Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981).

2 The Supreme Court most recently addressed the issue of whether federal
 3 statutes create rights enforceable under section 1983 in *Gonzaga University v. Doe*,
 4 536 U.S. 273 (2002). In *Gonzaga*, the Supreme Court found that a student could
 5 not sue a private university for damages under section 1983 to enforce provisions
 6 of the Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. §
 7 1232g, which prohibits the federal funding of educational institutions that have a
 8 policy or practice of releasing education records to unauthorized persons. The
 9 Court found that FERPA’s nondisclosure provisions failed to confer enforceable
 10 rights because they (1) lack the sort of “rights-creating” language critical to
 11 showing congressional intent to create new rights; (2) are concerned with the
 12 “aggregate” effect of institutional policy and practice and are not concerned with
 13 “whether the needs of any particular person have been satisfied;” and (3) serve
 14 primarily to direct the distribution of public funds. *Id.* at 290-91.

15 Under the *Gonzaga* standard, the provisions of 26 U.S.C. § 42 do not appear
 16 to confer individual rights upon the Plaintiffs in this action. First, the only “rights-
 17 creating” language contained in 26 U.S.C. § 42(h) is several steps removed from
 18 the residents themselves. Under the statute, in order for a housing development to
 19 enjoy tax credits it must enter into an agreement with the housing credit authority
 20 (here, the Washington State Housing Commission) to provide certain benefits to
 21 low-income residents, including prohibitions against eviction without cause that
 22 are enforceable in state courts. At most, section 42 uses Congress’s taxing and
 23 spending power to create a private cause of action for specific performance against
 24 a taxpayer. The legislative history of the Act supports this conclusion: the
 25 “Explanation of Provisions” section of House Report 101-247 (Sept. 20, 1989)
 26 explains the reason subsection (h)(6) was added and states that “[t]his provision
 27 contemplates a remedy of specific enforcement in the State courts but does not
 28 create a remedy under Federal Law.”

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1 Accordingly, the Court finds that the language of 26 U.S.C. § 42(h) is not
 2 equivalent to the language of Title VII, cited by the Supreme Court in *Gonzaga*, as
 3 classic rights-creating language: “No person in the United States shall . . . be
 4 subjected to discrimination under any program or activity receiving Federal
 5 financial assistance.” *See Gonzaga*, 536 U.S. at 284, n. 3 (citing 42 U.S.C.
 6 § 2000d). Instead, the benefits conferred upon low-income residents through the
 7 tax credit program are tangential to the agreement between the taxpayer and the
 8 housing credit authority. However, it is “rights, not the broader or vaguer
 9 ‘benefits’ or ‘interests,’ that may be enforced under the authority” of section 1983.
 10 *Gonzaga*, 536 U.S. at 283.

11 Second, the tax credit program also has an “aggregate” rather than individual
 12 focus. Instead of requiring strict compliance on a case-by-case basis, the act only
 13 requires “substantial” compliance. Should a taxpayer fail to have an “extended
 14 low income housing commitment” with good cause eviction protection in effect,
 15 section 42(h)(6)(J) provides that the “[e]ffect of noncompliance” is that the
 16 taxpayer will be denied the credit for the current year unless “the failure is
 17 corrected within 1 year from the date of the determination.” Therefore, a taxpayer
 18 could fail to have an extended low income housing commitment in effect for
 19 eleven months and still comply with the Act. In *Gonzaga*, the court focused on the
 20 fact that funding recipients could avoid termination of funding through substantial
 21 compliance with the FERPA; the Court found that substantial compliance
 22 provisions could not demonstrate the requisite congressional intent to confer
 23 individual rights. *Gonzaga*, 536 U.S. at 288-89.

24 Finally, as in *Gonzaga*, the Federal Low Income Housing Tax Credit Act
 25 serves primarily to direct the distribution of government funds rather than to confer
 26 rights. Section 42 governs the distribution of tax credits to private housing
 27 developers and encourage development of low-income housing, rather than to
 28 confer rights on low-income tenants or develop publicly- owned housing projects

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1 (such as Section 8 housing). For these reasons, the Court finds that the Act does
 2 not meet the individual rights test espoused by the Supreme Court in *Gonzaga* and
 3 does not provide a private right of action that can be enforced under section 1983.

4 The conclusion that no individual enforceable right exists under section 42 is
 5 buttressed by the fact that Congress has created an alternate enforcement scheme
 6 for the tax credit program. The Act requires qualified housing credit agencies to
 7 submit qualified allocation plans, which must outline the “procedure that the
 8 agency (or an agent or other private contractor of such agency) will follow in
 9 monitoring for noncompliance with the provisions of this section and in notifying
 10 the Internal Revenue Service of such noncompliance” 26 U.S.C. §
 11 42(m)(1)(B)(iii). As part of this allocation plan, the Washington State Housing
 12 Finance Commission requires Frenchman Hill to abide by the terms of the Low
 13 Income Housing Tax Credit Program as a condition of its Regulatory Agreement.
 14 The partnership must submit an annual certification to the Commission, providing
 15 under penalty of perjury, that an extended low-income housing commitment was in
 16 effect at all times during the preceding 12 months (See Ex. 1 to Commission’s
 17 Answer, §§ 4.17, 5.8). Therefore, the housing credit agency acts as a watchdog for
 18 the IRS. The IRS, in turn, has ample auditing power to strip undeserving
 19 developments of their tax credits or prosecute wayward taxpayers.

20 In their responsive briefing, the Defendants seek dismissal of the Plaintiffs’
 21 section 1983 claims on the ground that 26 U.S.C. § 42 does not create enforceable
 22 rights. Since this motion is not properly raised as a cross-motion for summary
 23 judgment, the Court finds it is proper to enter judgment *sua sponte*. The fact that
 24 Defendants raised the specter of dismissal, however, provides evidence that the
 25 Plaintiffs have had a full and fair opportunity to “ventilate” the issues involved in
 26 the matter. In an abundance of caution, the Court grants Plaintiffs leave to file an
 27 objection to the entry of summary judgment, *sua sponte*, within ten days of the
 28 entrance of this order. If no objection is received, the Court will find that no

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1 private right of action exists under 26 U.S.C. § 42(h)(6), and *sua sponte* grant
 2 summary judgment for Defendants on this claim.

3 **3. Due Process**

4 The Plaintiffs allege that the FHA Partnership, Cambridge Management, Inc.
 5 (“Cambridge”), the Housing Authority of Grant County, and John Poling, have
 6 violated the due process guarantees of the United States Constitution by attempting
 7 to evict the Plaintiff from his apartment without good cause. The Plaintiffs argue
 8 that low-income tenants at Frenchman Hill have a legitimate claim of entitlement
 9 to the continued use and enjoyment of their homes, and public housing authorities
 10 are government agencies whose actions are subject to due process requirements.
 11 The Defendants assert that because Frenchman Hill Apartments is a private
 12 housing complex, the FHA Partnership should not be subject to the due process
 13 clause. Moreover, the Defendants assert that the tenants do not have a property
 14 interest in their tenancies because the good cause requirement is not in effect for
 15 the entire long-term commitment period.

16 To survive summary judgment, the Plaintiffs must present facts
 17 demonstrating (1) sufficient governmental participation and involvement to subject
 18 the Defendants to the due process clause; (2) a constitutionally protected property
 19 interest in not being evicted from their apartments; and (3) that they were denied
 20 procedural safeguards required by due process. *See Geneva Towers Tenants Org.*
 21 *v. Federated Mortgage Investors*, 504 F.2d 483 (9th Cir. 1974).

22 **A. Government Action**

23 As a starting matter, to prevail under section 1983, the Plaintiffs must show
 24 that the Defendants’ “actions were fairly attributable to the federal or state
 25 government.” *See Mathis v. Pacific Gas & Elec. Co.*, 75 F.3d 498, 502 (9th Cir.
 26 1996) (*citing Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)). Action by
 27 a private party, without something more, is not sufficient to justify a
 28 characterization of that party as a state actor. The Supreme Court has that a private

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1 actor may be characterized as a state actor when there is a sufficient “nexus” or
 2 symbiotic relationship between state and private activity. *See Jackson v.*
 3 *Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Burton v. Wilmington Parking*
 4 *Authority*, 365 U.S. 715 (1961). Any inquiry into whether a private entity should
 5 be characterized as a state actor is fact specific. *See Howerton v. Gabicia*, 708
 6 F.2d 380, 383 (9th Cir. 1983). “[S]ubstantial coordination and integration between
 7 the private entity and the government are the essence of a symbiotic relationship.”
 8 *Brunette v. Humane Society of Ventura County*, 294 F.3d 1205, 1213 (9th Cir.
 9 2002). Courts have looked to evidence of a government entity’s financial
 10 interdependence with or plenary control over a private entity to determine if a
 11 symbiotic relationship exists. *Id; but see Leeds v. Meltz*, 86 F.3d 51, 54 (2d Cir.
 12 1996) (holding that neither government funding nor regulation alone is sufficient
 13 to confer section 1983 liability on private actors).

14 The Court finds that a symbiotic relationship exists between Grant County
 15 Housing Authority and the FHA Partnership, and based on this relationship the
 16 actions of the FHA Partnership are sufficiently attributable to the state. Because
 17 the Grant County Housing Authority is the general partner of the FHA Partnership
 18 and manages the Partnership’s day-to-day affairs, there is significant government
 19 control over the private entity’s actions. As such, the daily decision of the FHA
 20 Partnership are, in truth, the decisions of the state actor. Furthermore, the FHA
 21 Partnership and GCHA are financially interrelated. GCHA is a .01 percent owner
 22 of the FHA Partnership. Moreover, the Plaintiffs point out, that the FHA
 23 Partnership developed the Apartments through the sale of tax credits, monies from
 24 the Washington State Housing Trust Fund, Community Development Block Grant
 25 Funds, and the Federal Home Loan Bank of Seattle. This funding package was
 26 coordinated, in part, by the Grant County Housing Authority. The Defendants
 27 argue that FHA Partnership is not a state actor, because the partnership agreement
 28 allows the 99.99% owner, Related Capital Partners XI, L.P., to remove Grant

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1 County. The fact that a government entity or a private party may choose to
 2 extricate itself from a symbiotic relationship, however, does not negate the
 3 existence of that relationship.

4 The parties do not dispute that GCHA or John Poling are state actors.
 5 Cambridge Management, Inc., however, is a management company acting at the
 6 behest of FHA Partnership as an independent contractor. The Plaintiffs have
 7 alleged no facts sufficient to show Cambridge is a state actor.

8 **B. Constitutionally Protected Property Interest**

9 The Plaintiffs must establish that they have a legitimate, objectively
 10 justifiable claim to the benefits of the government program. In *Board of Regents v.*
 11 *Roth*, the Court held that:

12 [t]o have a property interest in a benefit, a person clearly must have more
 13 than an abstract need or desire for it. He must have more than a unilateral
 14 expectation of it. He must, instead, have a legitimate claim of entitlement to
 15 it.

16 408 U.S. 564, 477 (1972). The Supreme Court has explained that in order to have
 17 a property interest in a governmental benefit (as opposed to a right), the receipt of
 18 that benefit must be guaranteed absent cause for termination. *See Memphis Light,*
Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1978).

19 Plaintiffs allege that they have a legitimate interest in the continued use and
 20 enjoyment of their rent-controlled apartments, because the receipt of that benefit is
 21 guaranteed, absent good cause eviction. The Plaintiffs analogize the below-market
 22 housing provided by the Apartments to the rent subsidies provided under the
 23 Section 8 Set-Aside Program, 42 U.S.C. § 1437f. *See Gallman v. Pierce*, 639 F.
 24 Supp. 472 (N.D. Cal. 1986) (holding that section 8 tenants had a property interest
 25 in not being evicted without good cause); *Joy v. Daniels*, 479 F.2d 1236, 1241 (4th
 26 Cir. 1973) (holding tenant in private housing receiving federal rent subsidy has a
 27 property interest in continuing his tenancy, absent good cause to terminate); and
 28 *Escalara v. New York City Housing Auth.*, 425 F.2d 853 (2d Cir. 1970) (holding

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1 public housing tenant has property right in ongoing tenancy). As discussed *supra*,
 2 the Court finds that under section 42(h)(6)(B)(i) the extended low-income housing
 3 commitment must include a prohibition on eviction without good cause during the
 4 entire extended use period. Accordingly, the Court finds that because the
 5 Frenchman Hill Apartment low-income tenants are entitled to continue to reside in
 6 their apartments, absent good cause for eviction, they have a property right in their
 7 tenancy.²

8 **C. Procedural Safeguards**

9 Plaintiffs assert that Mr. Mendoza received insufficient procedural
 10 protections in his without cause eviction notice. The parties agree that the only
 11 process Defendant received was a 20-day notice under Washington law that did not
 12 specify a cause for his eviction. Plaintiff Mendoza, however, does not request an
 13 administrative hearing on his eviction notice, which has since been voided.
 14 Instead, he requests a declaratory judgment that “[e]victions financed under the
 15 Tax Credit Program are governed by the Due Process Clause of the Fourteenth
 16 Amendment” and that “[d]ue process requires that tenants of Tax Credit projects be
 17 informed of the reasons for eviction; that tenants of Tax Credit projects have a
 18 meaningful opportunity to contest the grounds alleged for eviction; and that the
 19 owner or managing agent of Tax Credit projects establish good cause prior to
 20 eviction.” (*Plaintiffs’ Memorandum in Support of Summary Judgment* at 17.)

21 In the public housing context, courts have applied *Goldberg v. Kelly*, 397
 22 U.S. 254 (1970), to hold that public housing tenants (who are subject to eviction
 23 only with good cause) are entitled to (1) timely and adequate notice detailing the
 24 reasons for a proposed termination or eviction; (2) a hearing before an impartial
 25 decision maker; (3) the ability to cross-examine adverse witnesses; (4) the

27 ² This property right exists as long as the FHA Partnership participates in
 28 the tax credit program.

1 opportunity to be represented by counsel at the hearing; and (5) a decision, based
 2 on evidence adduced at the hearing. *See Caulder v. Durham Housing Auth.*, 433
 3 F.2d 998 (4th Cir. 1970); *Escalera v. New York City Housing Auth.*, 425 F.2d 853
 4 (2d Cir. 1970).

5 In the case at hand, Mr. Mendoza was not provided with timely and adequate
 6 notice detailing the reasons for a proposed eviction. Instead, he was provided a
 7 notice of eviction without cause. The Court finds that by failing to provide
 8 detailed reasons for the proposed eviction, the owners and managers of the
 9 Apartments violated Mr. Mendoza's right to due process.

10 Beyond providing for good cause protections that may be specifically
 11 enforced, the Low-Income Housing Tax Credit program does not purport to govern
 12 eviction or termination procedures. Therefore, the Court must look to the
 13 procedures provided by the state of Washington. *See Gallman*, 639 F. Supp. at
 14 477. Washington law provides a summary procedure for evicting tenants. Wash.
 15 Rev. Code §§ 59.12, 59.18 *et seq.* Under the procedure described in section
 16 59.18.380, the landlord is entitled to a show cause hearing, and at that hearing the
 17 parties argue the merits of the case. *See Housing Authority of King County v.*
 18 *Saylor*, 578 P.2d 76 (Wash. Ct. App. 1978). At this hearing, the tenant may raise
 19 the affirmative defense that there is no good cause for eviction or termination. *Id.*
 20 at 874. Other states have allowed tenants to raise the defense of absence of good
 21 cause even if the good cause requirement is not explicitly listed in the extended
 22 long-term housing commitment. *See, i.e., Carter v. Maryland Mgmt. Co.*, 835
 23 A.2d 158 (2003); *Cimarron Village v. Washington*, 649 N.W. 2d 811 (Minn. Ct.
 24 App. 2003). Accordingly, with the exception of the notice and contents of the
 25 eviction notice, the Washington statutes provide adequate procedural safeguards to
 26 Mr. Mendoza.

27 **4. Declaratory Relief Regarding Propriety of Tax Credits**

28 The Plaintiffs seek a declaratory judgment under 28 U.S.C. § 2201 and

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 MOTION FOR SUMMARY JUDGMENT * 16**

1 Federal Rule of Civil Procedure 57 that:

- 2 b. Agreements prohibiting the eviction or termination of tenancy without
3 good cause and meeting the other requirements of 26 U.S.C. § 42
3 (h)(6) must be in effect before tax credits can be allowed under the
3 Tax Credit Program.
- 4 c. The Defendants' Regulatory Agreement fails to comply with 26
5 U.S.C. § 42(h)(6) and fails to satisfy a mandatory condition precedent
6 for the allowance of tax credits because it fails to include express
6 language prohibiting the eviction or termination of tenancies of
6 tenants of any low-income units other than for good cause.
- 7 d. The Defendant FHA is not eligible to receive tax credits under the Tax
8 Credit Program unless and until it and the Commission have in place
8 an agreement that prohibits the eviction or the termination of tenancy
9 (other than for good cause) of any tenant of any low-income unit.

10 (*Plaintiffs' Memo.* at 17). The Plaintiffs are third-party beneficiaries of the Low-
11 Income Housing Tax Credit Program and, therefore, have no standing to challenge
12 tax determinations by the IRS. *See Simon v. Eastern Kentucky Welfare Rights*
13 *Org.*, 426 U.S. 26 (1976). Accordingly, the Court finds that Plaintiffs are not
14 entitled to the above declaratory relief as a matter of law.

15 **5. Injunctive Relief**

16 The Plaintiffs also seek injunctive relief (1) prohibiting eviction of Plaintiff
17 Mendoza or other residents of the Apartments without good cause; (2) requiring
18 the Commission and the FHA Partnership to amend their Regulatory Agreement to
19 prohibit the eviction of a low-income tenant without cause; and (3) prohibiting the
20 Commission from allowing tax credits for the Apartments unless and until the FHA
21 Partnership has in place an agreement that expressly prohibits the eviction or
22 termination of tenancy (*Plaintiffs' Memo.* at 18). "The requirements for the
23 issuance of a permanent injunction are the likelihood of substantial and immediate
24 irreparable injury and the inadequacy of remedies at law." *American-Arab*
25 *Anti-Discrimination Comm'n v. Reno*, 70 F.3d 1045, 1066-67 (9th Cir. 1995)
26 (quotations and citations omitted).

27 The Plaintiffs assert that they are under a substantial and immediate threat of
28 eviction, and the remedy provided at law is inadequate because the mere filing of

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1 an unlawful detainer action carries with it the stigma of eviction and creates
2 negative rental history. The Plaintiffs have not shown that Mr. Mendoza or any
3 other Plaintiff is under threat of immediate eviction. Therefore, the likelihood of
4 any injury is speculative, at best. For this reason, the Court denies Plaintiffs'
5 requests for a permanent injunction.

6 For the remaining injunctive relief requested, the Plaintiffs do not present
7 argument on the likelihood of substantial and immediate irreparable injury or the
8 inadequacy of remedies at law. Therefore, the requested relief is denied.

9 Having reviewed the record, heard from counsel, and been fully advised in
10 this matter, **IT IS HEREBY ORDERED** that:

11 1. Plaintiffs' Motion for Summary Judgment (Ct. Rec. 31) is **DENIED IN**
12 **PART AND GRANTED IN PART.**

13 2. The Court holds that, under the circumstances of this case, the good cause
14 eviction of low-income tenants from the Frenchman Hill Apartments is governed
15 by the Due Process Clause of the Fourteenth Amendment. Due process requires
16 that Mr. Mendoza be provided with timely and adequate notice detailing the
17 reasons for a proposed termination or eviction.

18 3. The Court grants Plaintiffs **LEAVE** to file an objection **within ten days**
19 **of this Order** to a *sua sponte* entrance of summary judgment in favor of
20 Defendants Washington State Housing Commission and Kim Herman summary
21 judgment on Plaintiffs' claim to a private right of action under 26 U.S.C. §
22 42(h)(6). Plaintiffs' briefing shall not exceed 10 pages in length. If no objection is
23 filed, the Court shall enter an order granting summary judgment for Defendants on
24 this claim. Defendants need not file a response unless the Court orders them to do
25 so.

26 //

27

28 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT * 18

1 Order and forward copies to counsel.

2 **DATED** this 20th day of January, 2005.

3
4 s/ ROBERT H. WHALEY
5 UNITED STATES DISTRICT JUDGE
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